No. 198.

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Supreme Court of the United States.

By. of Field & Thompson for

OCTOBER TERM, 1901.

Filed Feb. 27, 1902.

JOHN G. JENKINS and ONE HUNDRED AND FORTY OTHER STOCKHOLDERS OF THE FIRST NATIONAL BANK OF BROOKLYN,

Plaintiffs-in-Error,

vs.

BARZILLAI G. NEFF, President, and JOHN DRESCHER, Jr., *et al.*, Assessors, Constituting The Board of Assessors of the City of Brooklyn for the Taxing Year 1897.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AND BRIEF OF THE PLAINTIFFS IN ERROR.

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Supreme Court of the United States,

OCTOBER TERM, 1901.

JOHN G. JENKINS and One hundred and forty other Stockholders of the First National Bank of Brooklyn, Plaintiffs-in-Error, vs. BARZILLAI G. NEFF, President, and John Drescher, Jr., *et al.*, Assessors, constituting the Board of Assessors of the City of Brooklyn for the Taxing Year 1897.	No. 198.

STATEMENT AND BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

A. An Outline Statement of the Case.—This is a proceeding by Certiorari, under §§ 250, 251, 252 and 253, of Chapter 908 of the Laws of New York of 1896, brought by John G. Jenkins and one hundred and forty others, stockholders of the First National Bank of

Brooklyn, against the defendants, constituting the Board of Assessors of the City of Brooklyn, to review and correct the assessment, for the year 1897, made by the respondents upon the shares of stock owned by the petitioners in the First National Bank of Brooklyn, New York, a National Banking Association, creating and existing under the Statute of the United States, known as the National Banking and Currency Act.

Record, p. 1.

The respondents made due return to the Certiorari, and thereafter a Referee was appointed to take evidence, and to report the same to the Court, with his findings of fact and conclusions of law thereon. The Referee proceeded to hear the evidence adduced by the parties.

Record, p. 70, *et seq.*

Thereafter the relators proposed to the Referee certain findings of fact which they deemed to have been established by the evidence taken before him, and certain conclusions of law which they deemed to arise thereon, and solicited his rulings upon the same.

Record, p. 42, *et seq.*

The Referee indorsed on the margins of this document his responses to each paragraph, either as "Found" or "Refused," or as "Found" with qualifying words, or as "Refused" with qualifying words. To these findings of fact an amendment was made, embodying an additional finding, by stipulation of the parties.

Record, p. 57.

Thereafter the Referee made, and the respondents filed, in a separate document, his "Findings of Fact and Conclusions of Law."

Record, p. 57, *et seq.*

In still another document the Referee made, and the respondents filed, the "Referee's Report."

Record, p. 57, *et seq.*

Thereafter the relators gave notice of a motion for an order modifying the Referee's report.

Record, p. 67.

And the respondents gave notice of a similar motion.

Record, p. 68.

The relators filed exceptions to the Referee's report.

Record, p. 68, *et seq.*

And the respondents also filed exceptions to the same.

Record, p. 70.

The cause coming on to be heard at Special Term of the Supreme Court before the Hon. Michael H. Hirschberg, was taken under advisement, and thereafter a written opinion was delivered by the learned Judge.

Record, p. 82, *et seq.*

And a final order was made, overruling the conclusions of the Referee, and confirming the assessment made by the respondents.

Record, pp. 89, 90.

From this order appeal was taken to the Appellate Division, Second Department, of the Supreme Court of the State of New York.

Record, p. 90.

Thereafter, the cause having been duly submitted to said Appellate Division by the respective parties through their counsel, upon oral arguments and printed briefs, the said Court, through Mr. Justice Woodward, delivered its opinion, in which it announced its judgment that the order appealed from should be affirmed with $10 costs and disbursements.

Record, p. 110, *et seq.*

Thereafter the Appellate Division entered judgment in conformity with this opinion.

Record, p. 117.

From which judgment an appeal was prosecuted to the Court of Appeals of the State of New York, where, after argument by counsel for the respective parties, the judgment of the Appellate Division was affirmed.

Record, pp. 125, 126.

The opinion of the Court of Appeals, delivered by Judge Bartlett, is found on the

Record, p. 119, *et seq.*

The record was thereafter remitted from the Court of Appeals to the Supreme Court of the State of New York.

Record, p. 126.

And the order of the Court of Appeals, affirming the order appealed from to said Court, was made the order of the Supreme Court at Special Term.

Record, p. 127.

To reverse the said order or judgment of the Court of Appeals of the State of New York, this

writ of error is prosecuted, in form to the Supreme Court of that State, where the record was thus lodged.

B. A Condensed Statement of the Rulings Below.—The assessment, as finally made by the respondents upon the shares of the relators, was at the rate of $336. per share. The effect of these various rulings will be best understood by the statement that the relators took and still adhere to the position that the assessment was wholly void, as being in contravention of the provision of Section 5219 of the Revised Statutes of the United States (Section 41 of the National Banking and Currency Act); that the Referee reported in favor of reducing the assessment to $268.-06 per share, while the learned Judge at Special Term confirmed the action of the assessors in fixing it at $336. per share, and this order was, in turn, affirmed by the Appellate Division; and the judgment of the Appellate Division was in turn affirmed by the Court of Appeals, and is the judgment which it is sought to re examine by this writ of error.

C. A Detailed Statement of the Facts, so far as they Present the Federal Question which this Court is Asked to Consider.

It is not thought necessary to set out the pleadings, as no question arises with reference to them.*

The return of the respondents (defendants in error), shows that the question made by the petition

*In this special certiorari proceeding, the return is not conclusive (People *ex rel.* v. Smith, 24 Hun, N. Y., 66.)

of the inequality of assessment for taxation as between the shareholders of the First National Bank of Brooklyn and other moneyed capital in the hands of individual citizens of the State, had been distinctly brought to the attention of the respondents as a board of tax assessors by a written notice from the stockholders (relators and plaintiffs in error herein), to the said board, on June 29th, 1897.

Record, p. 15.

It thus appears that the question intended to be submitted to this Court was raised *in limine* before the proper taxing officers, and was again raised in a variety of forms in the petition for certiorari.

The case was referred to a Referee to take evidence and report to the Court his findings of fact and conclusions of law.

Record, pp. 41, 42.

The relators (plaintiffs in error) adduced considerable evidence before the Referee, but the respondents (defendants in error) offered no countervailing evidence. The facts on which the judgment of the Court is invoked in this case therefore stand uncontroverted. As will hereinafter more fully appear, the exceptions to the rulings of the referee relate to his conclusions or deductions from an established state of facts.

The only controverted fact in the case, using the word fact in contradistinction from conclusion or deduction, was upon the question whether the relators had waived their right to maintain this proceeding, by reason of certain facts which had taken place prior thereto. The facts on which the claim that there had been such a waiver were set up by the respondents (defendants in error), in their return.

Record pp. 30, 31, and 32.

The evidence adduced in support of this claim of waiver is found in Schedule V annexed to the application of these relators (plaintiffs in error), to the respondents (defendants in error), for a reduction of the assessment on the shares of respondents. It shows—stating it most strongly for respondents—that the question whether there had been a waiver was a controverted question of fact. The Referee found that there had been no waiver;

Record, p. 63.

his finding on this contested question of fact is not re-examinable here, and nothing further will be said on the question.

The evidence adduced before the Referee was all presented by the relators (plaintiffs in error here), the respondents (defendants in error here) having rested without presenting any evidence. This evidence consisted, in the first place, of the testimony of a witness, EDWIN BOLITHO, laying the foundation for the introduction in evidence of the tax returns of all of the eight trust companies doing business in the then City of Brooklyn.

Record, p. 71.

These tax returns, numbered serially as exhibits one to eight, will be found in the

Record, beginning on p. 91 and ending on p. 104.

The Referee found, in each case except in the case of the Nassau Trust Company, that the system of assessment, deductions, or exemptions, was such as to leave no capital stock assessable for taxation for the year 1897 with respect to all of these trust companies except the Nassau Trust Company, which had an assessed valuation of only $6,361.

Record, pp. 49 to 53.

It was conceded by counsel for the respondents (defendants in error here),

Record, p. 72.

"That the capital of the trust companies in the City of Brooklyn was assessed for the year 1897 in the following manner: From the total gross assets of each company were deducted the amount of its indebtedness, including sums due depositors; the assessed value of the real estate owned by the corporation; an amount equivalent to ten per cent. of the capital stock whenever the corporation possessed a reserve fund of surplus profits exceeding the amount of said ten per cent.; such portion of the assets as were invested in securities of the United States, bonds of municipalities within the State, or in stock of other companies taxed upon their capital within the State; and any other securities exempt by law from taxation." It was further conceded by counsel for the respondents (defendants in error here) that, "in the case of each of the trust companies referred to, there was a surplus fund exceeding in amount ten per cent. of the capital stock, and the reduction of ten per cent. was made in each case."

Record, p. 72.

With reference to the nature of the business of the trust companies of Brooklyn, oral evidence was adduced before the referee, delivered by officers of three of these trust companies.

Mr. Frank L. Sniffen was secretary of the Manufacturers' Trust Company. That company loaned money and accepted all securities that were listed, or local securities that they knew all about. It made loans on personal security in the shape of notes, and called them bills purchased.

Record, pp. 77, 78.

In making loans on personal security the process was the same as any other notes subject to discount. They relied upon the strength of the maker as well as indorser. These loans were reduced to money again and reinvested from time to time, and this process kept up throughout the year. The capital of his company consisted of securities and were deposited by law, but the capital was paid in in money. They used their capital, surplus and undivided profits for the purpose of making a profit upon it from its use as money. When they made a loan on collateral they used a collateral note. Witness was here shown a collateral note put in evidence and called Exhibit 9.

Found on pp. 104 and 105 of the Record.

Witness did not think that their collateral note was exactly the same as the one shown to him. That was an old form of a note. "In a general way they are all about the same: our note is not the same as that." The witness had been employed in the Chemical National Bank for eight years, and he said: "We keep deposits and pay out money on checks in the Manufacturers' Trust Company in the same manner as is done in the Chemical Bank." He further testified: "I am familiar with the way in which the national banks in New York City and Brooklyn do their business, by reason of my connection and association with them in business."

James R. Cowing, the second vice-president and secretary of the Franklin Trust Company, testified that his company loaned money on collateral security, but did not, as a rule, loan money on a note, with or without indorsers and without collateral.

Record, p. 79.

It was admitted, for the purpose of this inquiry,

that the capital and surplus was all paid in the shape of cash. The witness further testified: "We use the money of our company for the purpose of making a profit from its use as money. We reduce our loans to money from time to time, and reinvest them in other loans. When one loan is paid off we reloan the money; and when we have money to loan we keep up that process throughout the year, reducing the loans to money and loaning it out again. We keep deposits for customers and pay them out on check in substantially the same manner as the banks do." Under objection from counsel for the respondents (plaintiffs in error here) this witness also testified that the general deposits of his trust company exceeded its trust deposits.

"Q. Does your Trust Company do business in the same way that the National Banks do, of your own knowledge?

A. In banking, yes."

* * * * * *

"We have what we call a Trust Department in the Manufacturers' Trust Company, and receive trust accounts from estates by order of the Court. We keep the trust deposits separate from the general deposits."

"Q. Which is the larger, your general deposits or your trust deposits?" Under objection by counsel for the respondents (plaintiffs in error here), the witness testified: "General deposits are the larger."

Mr. Edward Johnson, secretary of the Peoples' Trust Company, testified, among other things: "Our capital and surplus was all paid in in money. The surplus has since been increased from earnings. We keep general deposits and trust deposits. Our general deposits exceed our trust deposits. We loan money on collateral security.

We do not loan money on personal security, that is, a note with or without endorsers. We purchase notes. We occasionally purchase notes not secured by collateral."

Record, p. 79.

The witness was then asked by counsel for the relators (plaintiffs in error here). "In what respect does the process of purchasing a note differ from discounting a note?"

Under objection of counsel for the respondents (defendants in error here), the witness answered: "The business of purchasing notes is a very small part of our business, an incidental part. Practically, there is no difference. We buy a note at a discount. We reduce these loans on collateral and the money invested in notes on personal securities, to money again, from time to time, and reinvest it in other loans. That process keeps up throughout the year. We use our money for the purpose of making a profit on it as money. We keep our deposits and check them out in the same manner that banks do."

Record, pp. 79, 80.

On cross examination the same witness also stated: "The proportion of notes purchased, to our general business, is that, out of assets of, say, $9,000,000, we have to-day, I presume, not more than $300,000 worth of notes of all kinds, what we call Bills Purchased, that is about three per cent. We have loaned out on collateral, probably, $4,000,000 more.

Record, p. 80.

This witness further testified that the People's Trust Company was chartered in 1889; that the amount of its deposits in May, 1897, was some-

where in the neighborhood of $6,000,000—but could not recall it exactly; that it had trust deposits that were invested, amounting to about $1,000,000.

This witness having delivered from memory some testimony which, as taken down seems contradictory and unintelligible (it is found in the middle of page 80 of the Record), appears to have been brought down to the figures by the following question:

"Q. Can you tell me the amount of your deposits in trust on the first day of May, 1897?"

To this question the witness answered, under objection which was overruled:

"A. The amount of the trust funds was $272,-918.52. On the same day our individual deposits were $5,038,623.64; time certificates, $30,424.30; demand certificates of deposit, $833,989.06; loaned on collateral, $3,901,689.88; loaned on personal security, including bills purchased, $302,896.55."

Record, bottom of p. 80.

Mr. Cowing, recalled, then testified for the relators (plaintiffs in error here) against the objection of the respondents (defendants in error here) which was overruled, that on the first day of May, 1897, the Franklin Trust Company, of which he was an officer, had trust deposits amounting to $187,162.93; general deposits, $5,013,703.02; loaned on collateral, $1,721,932.44; loaned on personal security, including bills purchased, $505,-996.05; and that on the first day of June, 1897, the figures were as follows:

Deposits in trust	$ 232,160.36
General deposits	5,110,335.39

Loaned on collateral	1,558,911.44
Loaned on personal security, including bills purchased	460,291.20

Record, p. 81.

The relators, (plaintiffs in error in this court), against the objection of the respondents (defendants in error here), which was overruled,—the objection not running to the form of the testimony,—next put in evidence a statement showing the condition of the Manufacturers' Trust Company as of May, 1897, as follows:

Deposits in trust	$ 23,443.89
General deposits, including time and demand certificates	2,661,466.82
Amount loaned on collateral	1,236,521.25
Amount loaned on bond and mortgage and bills purchased	359,120.88

The Referee conformed his findings of fact to this testimony.

See Referee's findings numbered XXX, XXXI, and XXXIII; Record, pp. 55, 56.

For the purpose of showing the form of contract under which this trust company loaned money on collateral securities, the relators (plaintiffs in error here), also put in evidence a form of collateral note used by the Manufacturers' Trust Company.

Exhibit 10, Record, p. 105.

They also put in evidence a form of collateral note used by the bank of the relators (plaintiffs in error here) in loaning money.

Exhibit 12, Record, p. 107.

At the hearing before the Referee, in the examination of Mr. W. Addison Field, cashier of the

First National Bank, whose shareholders these relators are, the following questions were asked:

"Did your bank, at any time within the last ten years, commence paying interest to depositors?"

This question was admitted by the Referee, notwithstanding the objection and exception of counsel for the respondent, and the answer was "Yes."

Record, p. 76.

Then the two following questions were asked and excluded:

"Q. What induced your bank to take that action?"

"Q. Up to the time when you began to allow interests on deposits, had there been an increase or falling off in your deposits?"

Record, p. 77.

Nor would the Referee allow Mr. Charles D. Young, who was president of the National City Bank of Brooklyn, to answer the following question:

"Q. Has your bank suffered any in its deposits by reason of the competition of the trust companies, Mr. Young?"

Record, p. 75.

Having rejected this testimony, offered by the relators (plaintiffs in error here), for the purpose of showing that the stockholders of the national banks had suffered from the competition of the trust companies, the learned Referee refused to make the following finding of fact which was requested by the relators (plaintiffs in error here):

"XV. The moneyed capital thus used and "employed by said trust companies and the "stockholders therein, is invested for that pur-

"pose in securities by way of loan, discount "and otherwise, which are, from time to time, "according to the rules of business, reduced "again to money and reinvested. The said "trust companies are corporations in which "individual citizens own the shares of stock, "and the capital of said companies, employed "in carrying on its business is money, and the "object of such business is the making of "profit by its use as money; and the said trust "companies and the stockholders therein so "using and employing moneyed capital as "aforesaid come into direct competition with "the national banking associations and the "stockholders therein in their use and employ- "ment of moneyed capital."

Record, p. 49.

In his "Findings of Fact and Conclusions of Law," the Referee also inserted the following paragraph:

"I do also find, as matter of fact, from the evi- "dence before me, that the trust companies therein "named are not in competition with national banks, "within the sense and meaning of the words of Sec- "tion 5219 of the Revised Statutes [of the United "States], so as to make their shares of stock 'other "moneyed capital in the hands of individual citi- "zens.'"

Record, p. 63.

The Referee made this finding after having excluded the evidence of competition offered by the relators (plaintiffs in error here), above set out.

All of the judicial officers before whom this case was heard have based their decisions wholly upon the authority of the Mercantile Bank case.

See decision of Referee, Record, p. 65.
See decision of Judge at Special Term, Record, p. 85.

See decision of Appellate Division, Supreme Court, Record, p. 115.
See decision of Court of Appeals, Record, p. 122.

It thus appears that all the judicial officers of the State of New York, from the Referee to the Court of Appeals, denied the relief sought for by the relators (plaintiffs in error here) on the authority of the decision of this Court in the case of *Mercantile Bank v. New York, 121 U. S., 138;* and it is freely conceded that if the Mercantile Bank case requires this conclusion in a case presenting the state of the law and facts disclosed by this record, we have no right to be here.

On the question of the disparity of taxation as between the trust companies and the national banks, the Referee, at the request of the relators (plaintiffs in error here), made the two following findings:

"XXVI. That the aggregate assessed value of "the share stock of the national banks of the Bor-"ough (late City) of Brooklyn for the year 1897, as "ascertained and fixed by the Board of Assessors of "said city, is six million, four hundred and ninety-"five thousand, one hundred dollars ($6,495,100). "That certain of the shareholders of said stock ap-"plied for a reduction or cancellation of their indi-"vidual assessments on their holdings of said bank "stock, and the same was reduced or cancelled to "the amount of two million, one hundred and for-"ty-nine thousand, five hundred and seventy-eight "dollars ($2,149,578), leaving the amount of share "stock of national banks in the hands of the owners "or holders thereof in the City of Brooklyn for the "year 1897, on which the tax is actually and finally "assessed at the aggregate sum of four million, "three hundred and forty-five thousand, five "hundred and twenty-two dollars ($4,345,522)."

Record, p. 54.

"XXVII. That the total aggregate value of the "capital surplus and undivided profits of the eight "trust companies of the Borough (late City) of "Brooklyn for the year 1897, as shown by their "statements to the said Board of Assessors, "amounts to eleven million, four hundred and "eighty-five thousand, five hundred and twenty-"nine dollars and eighty-six cents ($11,485,529.86). "That the total aggregate value of the capital, "surplus and undivided profits of all the State and "National banks of the Borough (late City) of "Brooklyn as ascertained by said Board of Assess-"ors for the year 1897, after deducting therefrom "the assessed value of the real estate of all of said "banks, and the allowances set forth in paragraph "11 of the petition, amount in the aggregate to "six million, four hundred and ninety-five thous-"and, one hundred dollars ($6,495,100). That of "said capital, surplus, and undivided profits "of said trust companies, as above set forth, only "the sum of six thousand, three hundred and "sixty-one ($6,361) of the value thereof is capital "assessed for taxation for the year 1897, where-"as Four million, three hundred and forty-five "thousand, five hundred and twenty-two dollars "($4,345,522) of the aggregate value of the capital, "surplus and undivided profits of said banks is "actually assessed for taxation for the year 1897."

Record, pp. 54, 55.

On the basis of the foregoing evidence the Referee was requested to make the following finding, which he made after qualifying it thus: "*Found, except as to the words 'moneyed capital,' which I change to 'money.'*"

"XXV. That the owners and holders of the shares "of the capital stock in each and all of said trust "companies within the State of New York are "'individual citizens' using and employing 'mon-"eyed capital' for profit by its use as money. That "the shares of stock of such trust companies in the "hands of the owners or holders thereof are exempt "from taxation under subdivision 16 of Section 4 of

"the 'Tax Law,' Chapter 908 of the Laws of 1896
"of the State of New York, which reads as follows:

> " 'The owner or holder of stock in an incor-
> " 'porated company liable to taxation on its
> " 'capital shall not be taxed as an individual
> " 'for such stock.' "

Record, p. 54.

It will be perceived that the finding, as thus modified by the Referee reads as follows:

"That the owners and holders of the shares of
"the capital stock in each and all of said trust com-
"panies within the State of New York are 'individ-
"ual citizens' using and employing money for profit
"by its use as money. That the shares of stock of
"such trust companies in the hands of the owners
"or holders thereof are exempt from taxation under
"subdivision 16 of Section 4 of 'the Tax Law,'
"Chapter 908 of the Laws of 1896 of the State of
"New York, which reads as follows:

> " 'The owner or holder of stock in an in-
> " 'corporated company liable to taxation on
> " 'its capital shall not be taxed as an indi-
> " 'vidual for such stock.' "

Upon this finding the relators (plaintiffs in error here) will invoke the judgment of this Court in their favor.

In the course of the taking of testimony before the referee, counsel for the respondents (plaintiffs in error here), conceded that the Manufacturers' Trust Co., and *every trust company*, exercised all the powers conferred upon it by statute.

Record, p, 78.

The same concession was made with special refference to the Franklin Trust Company.

Record, near the bottom of p. 79.

Assignment of Errors.

The errors assigned in this Court are as follows:

Record, p. 128 to 131.

1. That the Court below erred in sustaining the exceptions of the respondents (defendants in error in this Court) and in overruling the exceptions of the petitioners (plaintiffs in error in this Court) to the report of the Referee made in said cause.

2. That the Court below erred in modifying the report of the said Referee so as to exclude the reduction of taxes assessed against the shares of these relators (plaintiffs in error in this Court) allowed by him in his conclusion of law numbered "second."

3. That the Court below erred in overruling an exception made by these relators (plaintiffs in error in this Court) to the rulings of the Referee wherein he refused to allow the said relators to show that the national banks existing in the City of Brooklyn, in point of fact, suffered from the unfriendly competition of the trust companies existing in that city.

4. That the Court below erred in overruling the exceptions taken by these relators (plaintiffs in error in this Court) to the refusal of the Referee to find in accordance with the twenty-eight findings of fact presented by the relators to him.

5. That the Court below erred in sustaining so much of the report of the Referee wherein he found, "as matter of fact," on the evidence before him, that the trust companies therein named were not in competition with national banks within the sense and meaning of the words of Section 5219 of the Revised Statutes of the United States.

so as to make their shares of stock "other moneyed capital in the hands of individual citizens." The finding was not a "matter of fact," but was a conclusion of law to be drawn from established facts, involving the interpretation of the Federal Statute; hence the plaintiffs in error are not concluded in this Court by the frame of language employed by the referee in making this finding.

6. That the Court below erred in confirming the first conclusion of law found by the Referee, namely, that the provision of Chapter 908 of the taxing law of the State of New York of 1896, was not unconstitutional or illegal as being in violation of Section 5219 of the Revised Statutes of the United States.

7. That the Court below erred in giving no value to the fact found by the referee, that in ascertaining the value for taxation of the shares of the First National Bank of Brooklyn for the taxing year 1897 the Board of Assessors (respondents in the Court below and defendants-in-error in this proceeding) made their estimate upon the basis of the aggregate value of the capital stock, the surplus, and the undivided profits of the said First National Bank, but did not allow the deduction therefrom of ten per centum of the capital stock of the said First National Bank, which deduction was allowed the eight trust companies of the taxing district of Brooklyn in assessing their property for taxation, thus creating a discrimination against these relators (plaintiffs in error in this Court) in favor of the other moneyed capital in the hands of individual citizens of the State of New York, contrary to Section 41 of the National Banking and Currency Act, the same being Section 5219 of the Revised Statutes of the United States.

8. That the Court below erred in giving no value to the facts found by the Referee and confirmed by the Court in holding that whereas the eight trust companies of the City of Brooklyn had in the taxing year 1897 an aggregate of capital, surplus, and undivided profits amounting to $11,485,529.86, but were nevertheless taxed only upon the sum of $6,361, whereas the national banks of said city were assessed upon an aggregate value of their stock for said year in the sum of $6,495,100, which, after allowing deductions to the shareholders in respect of their individual indebtedness, left an aggregate value of their stock assessed for taxation in the sum of $4,345,522, and in holding that this was not a violation of that clause of Section 41 of the National Bank Act, the same being Section 5219 of the Revised Statutes of the United States, which provides that State taxation of the shares of national banks "shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

9. That the Court below erred in holding that this case was governed by the decision of the Supreme Court of the United States in the case of *Mercantile Bank v. New York, 121 U. S., 138*, which decision was rendered in the year 1887, the Statute law of the State of New York having been since amended so as to confer upon the trust companies of said State all the powers possessed by the banks of said State, except the power to issue circulating notes, the undisputed evidence in this case showing that the eight trust companies of the City of Brooklyn, the taxing district within which the shares of the First National Bank of Brooklyn were taxed for the taxing year 1897, were in the habitual exercise of the powers of the banks, and

that their strictly banking business constituted about ninety-six and one-half per centum of all their business, while their so-called "trust business" constituted a very small per centum of all their business, so that upon the existing statute law and the incontestible facts of this record this case stands on a totally different footing from the Mercantile Bank case.

10. That the Court below erred in drawing the conclusion of law upon the undisputed evidence taken and returned by the Referee and from the facts found by the Referee on said evidence, that the eight trust companies existing in the City of Brooklyn in the taxing year 1897 were not banks and did not employ their capital (save as to the issuing of circulating notes) in the same way wherein the national banks then existing in the City of Brooklyn employed their capital, and in holding that said trust companies were not in competition with the national banks.

11. That the Court below erred in holding that the assessment made by respondents in said proceedings (defendants in error in this Court) of the shares of the First National Bank of Brooklyn owned by the relators in said proceedings (plaintiffs in error in this Court) for the taxing year 1897, was not laid at a greater rate than the taxes laid by the said board of assessors for the said taxing year upon moneyed capital in the hands of individual citizens of the State of New York, namely, in the hands of eight trust companies of the City of Brooklyn, said city being the taxing district over which said board of assessors exercised its jurisdiction.

12. That the Court below erred in modifying the report of said referee by fixing the value of the shares of the stock of the First National Bank of

Brooklyn, for the purpose of assessment for taxation in the year 1897, at the sum of $336 per share, and in confirming the report as thus modified.

13. That the Court below erred in comfirming the assessment of the shares of stock of the First National Bank of Brooklyn for the year 1897, as finally fixed by the board of assessors of the City of Brooklyn at $336 per share, and in adjudging that the respondents (defendants in error in this Court) recover the costs and disbursements of said proceeding.

14. That the Court below erred in refusing to adjudge the assessment made upon the shares of these relators (plaintiffs in error) to be void upon the ground that the national banks were assessed upon a different principle from that upon which the trust companies were assessed.

15. That the Court of Appeals of the State of New York erred in not reversing the final order and judgment of the Appellate Division for the Second Judicial Department of said State, and in not reversing the final order of the Supreme Court of said State for Kings County, and in not directing a judgment or order to be entered for the relators (plaintiffs in error in this Court) striking the assessment laid upon the shares of stock of the First National Bank of Brooklyn from the assessment-rolls of the City of Brooklyn for the year 1897, and awarding costs to the relators.

Record, pp. 128 to 131.

Brief and Argument.

I. Grounds on which the Favorable Decision of this Court is invoked.

The plaintiffs in error invoke a favorable decision of this Court upon two essential grounds:

1. That this record incontestably shows that the eight trust companies of the then City of Brooklyn *were essentially banks* and were employing "moneyed capital" in direct and necessary competition with the National Bank in which these relators (plaintiffs in error here), are shareholders.

2. That the trust companies were taxed under a different law and under a different system from those applied in the taxation of the shares of the National Banks, and with the result that seven of said trust companies escaped taxation entirely except upon their real estate, while the eighth, a small trust company, was taxed (except upon its real estate) upon a valuation of $6,361 only. If the first proposition is decided in our favor, the second need scarcely be argued, so gross and manifest was the inequality of taxation between these two classes of institutions. The stress of this case lies, therefore, in the question whether this record shows incontestably that the eight trust companies of Brooklyn were essentially banks and were competing with the National Banks of Brooklyn in the use of "moneyed capital" within the meaning of Section 5219 of the Revised Statutes of the United States.

In discussing this question we take certain things for granted: that the Federal statute known as The National Banking and Currency Act is a part of "the supreme law of the land," and binds the Judges of the Courts of the State of New York

"anything in the Constitution or laws of any State to the contrary notwithstanding."

Const. of U. S., Art. VI, Sec. 2,

that Congress had the constitutional power to create the National banks;

McCullough *v.* Maryland, 4 Wheat. (U. S.), 316.
Allen *v.* Assessors, 3 Wall. (U. S.), 573;

that the National banks are agencies of the United States and that the States have no power whatever to tax them without the permission of Congress.

Van Allen *v.* Assessors, 3 Wall. (U. S.), 573.
New York *v.* Weaver, 100 U. S., 539.
Citizens' Savings Bank *v.* Owensboro, 173 U. S., 636, 667,

that the States derive their power to tax National banks solely from the permission of Congress; that the permissive act of Congress, which alone confers and defines this power, is found in Section 41 of the National Banking and Currency Act, now Section 5219 of the Revised Statutes of the United States, and is as follows:

"Nothing herein shall prevent all the shares "of any association from being included in the "valuation of the personal property of the "owner or holder of such shares, in assessing "taxes imposed by authority of the State with- "in which the association is located: but the "Legislature of each State may determine and "direct the manner and place of taxing all the "shares of National banking associations lo- "cated within the State, subject only to the "two restrictions, that the taxation shall not "be at a greater rate than is assessed upon

"other moneyed capital in the hands of indi-
"vidual citizens of such State, and that the
"*shares of any National banking* association
"owned by non-residents of any State, shall be
"taxed in the city or town where the bank is
"located, and not elsewhere. Nothing herein
"shall be construed to exempt the real prop-
"erty of associations from either State, county
"or municipal taxes, to the same extent, ac-
"cording to its value, as other real property
"is taxed."

The Legislature of New York, instructed by a number of decisions of this Court,

> People *v.* Commissioners, 2 Black (U. S.), 620;
>
> People *v.* Commissioners, 2 Wall. (U. S.), 200;
>
> Van Allen *v.* Assessors, 3 Wall. (U. S.), 573;
>
> New York *v.* Weaver, 100 U. S., 539,—

succeeded at last in enacting a taxing law applicable to all banks, State and National, in substantial conformity with the language of the permissive Federal statute already quoted. As the State banks are taxed upon the same principles, the same valuations and at the same rate as the National banks, there is here no question of any discrimination against the First National Bank of Brooklyn in respect of a moneyed capital employed by other banks, so-called. But the eight trust companies of Brooklyn are not taxed as banks, but are taxed under the general law relating to the taxations of corporations. They are taxed on a different principle from the banks. The banks are taxed upon their shares, under a statute which allows personal deductions to the respective shareholders of their respective debts—a feature added to the taxing law with reference to banks, under

the compulsion of the decision of this Court in *New York* v. *Weaver*, 100 U. S., 539.

The trust companies, however, are taxed upon their capital, just as a manufacturing corporation is taxed—just as the Gas Light Company was, and should have been taxed, in the case of *People ex rel. v. Barker* (144 N. Y., 94).

They were assessed upon such principles and at such valuations that all their property except their real estate escaped taxation entirely, with the single exception of one small trust company, which was taxed upon a valuation of $6,361 only.

The Referee has found the aggregate value of the aggregate capital and surplus of the eight Brooklyn trust companies for the year 1897, as shown by their tax returns to have been $11,485,529.86; and a computation will show that the aggregate amount of their capital which would have formed the basis of the taxation of their shares, if their shares had been assessed upon the same principle as the shares of the National banks, would have been $11,035,529.85. All this escaped taxation, except the paltry sum of $6,361. If the trust companies had been taxed in respect of their shares, on the same principle as the National banks, 33 per cent. of this amount would probably have been "sworn off" by their shareholders by reason of their individual indebtedness; for this was the average per cent. that was "sworn of" by the shareholders of the twenty-one Brooklyn banks for the taxing year 1897, as shown by the table ("Exhibit No. 1, Defense") on pages 108 and 109 of the Record. If we deduct this percentage from the aggregate taxable capital of the trust companies, we have left the great sum of $7,393,805.01. *This entire sum with the exception of $6,361 escaped taxation.* On the other hand, the five National banks of Brooklyn were assessed theoretically

upon their shares, the assessment being, however, paid by the respective banks, after their shareholders had "sworn off" their respective indebtedness, in the sum of $2,228,958; and the State banks were, in like manner, after the "swearing off" of their respective debts by their shareholders, assessed in the sum of $2,116,564; so that the aggregate amount of moneyed capital in respect of which the twenty-one Brooklyn banks, State and National, were assessed, amounted to $4,345,422. While these banks, many of them small ones, bore taxation on this great aggregate, the trust companies, as we have seen, escaped taxation altogether, with the exception of the small item of $6,361, already mentioned.

See the table, Record, pp. 108, 109.

State these figures in any way, turn them around and view them from any standpoint, and the conclusion cannot be escaped that one class of corporations engaged, in respect of nearly all their assets in the business of banking, escaped taxation entirely, while the other banks were taxed in respect of a greater part of their capital. These financial institutions, the one class enjoying a total immunity from taxation, except upon their real estate, the other class thus heavily taxed, were situated in the business centre of the same city, with one or two small exceptions, and were competing with each other in the use of money as capital, in the business of receiving deposits of money, and of lending out money on collateral or on personal security at interest; or, what is substantially the same thing, buying notes at a discount, or a "shave," for profit. This unjust discrimination—so great as to partake of the nature of criminality—was deliberately inflicted under the law of New York; it was sanctioned by that

law. A greater injustice—a greater outrage under the forms and sanctions of law—could scarcely be imagined. Upon the face of these plain figures, can the Court doubt that the shares of the First National Bank of Brooklyn were taxed at a greater rate than that imposed on other moneyed capital in the hands of individual citizens of this State?

II. The case of Mercantile Bank v. New York Distinguishable from the Case at Bar.—All the judicial officers who took part in the decision of this case in the various Courts below founded their conclusion against the relators on the authority of the decision of this Court in *Mercantile Bank v. New York*, *121 U. S.*, *138*. We concede that if that decision is a controlling authority for the decision of the case at bar, then we have no right to be here. But it will indisputably appear from an examination of this record that the relators made out an essentially different case from the Mercantile Bank case, and a case on which they believe they are entitled to invoke the judgment of this Court in their favor. In the first place, the Mercantile Bank case was a case which was presented upon an agreed statement of facts, and it is subject to all the infirmities which attach to agreed cases. It will appear from an examination of that case in comparison with the record in this case, that counsel in that case neglected to enlighten the Court as to the manner in which the trust companies in New York employ their capital, but left that to be inferred by the Court from an examination of the then statute law conferring powers upon trust companies. In the agreed statement of facts in that case

there is not a line nor a word as to the extent to which the trust companies then doing business in the City of New York, which was the taxing district in that case, employed their capital in the mere business of banking. On the other hand, it is submitted that the record in this case conclusively shows that the eight trust companies in the then city of Brooklyn, at the time when the tax sought to be relieved against was laid upon the shares of these relators, having a capital and surplus amounting in the aggregate to between eleven and twelve million dollars, were engaged almost exclusively in the business of banking, so much so that their so-called trust business was a mere bagatelle of the general volume of their business. This being so, they were, under the very language used by this Court in the Mercantile Bank case, using moneyed capital within the meaning of Section 5219 of the Revised Statutes of the United States. Pursuing the language of this Court, it conclusively appears that they received money on deposit and invested it in loans, and therefore dealt in money and in securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of "moneyed capital" in the hands of individuals, as used in the Act of Congress,

> Mercantile Bank v. New York, 121 U. S., near the bottom of page 159,

and they were using almost their entire capital and surplus in this way, and were, hence, essentially banks; and the conclusion is unavoidable that they were competing with the national banks of Brooklyn in the ordinary business of banking, and the referee erred in refusing so to find.

The very next sentence in the opinion of this Court furnishes the keynote to the decision

in the Mercantile Bank case. Counsel for the plaintiff in that case were equally unfortunate in failing so to construct the agreed statement of facts as to show that the rate of taxation applied to the trust companies was less than that imposed upon shares of stock in the national banks. All this was left blind, and to be inferred from an examination of statutes. This Court after thus conceding that trust companies engaged in banking "were employing moneyed capital in such a way that their shares were to be deemed moneyed capital in the hands of individuals, within the meaning of the Act of Congress, said: "But we fail to find in the record any sufficient ground to believe that the rate of taxation, which in fact falls upon this form of investment of moneyed capital, is less than that imposed upon shares of stock in national banks." Then, after referring to the tax laws of New York applicable to the subject as construed by the Court of Appeals of that State, this Court proceeded to say further: "It is evident, we think, that taxation in this mode is, at least, equal to that upon the shares of individual stockholders; for if the same property was held for the same uses and taxed by the same rule, in the hands of individuals, as moneyed capital, it would be subject to precisely the same deductions; in addition to which the individual would be entitled to make a further deduction of any debts he might owe. Upon these grounds, therefore, we are of opinion that this mode of taxing trust companies does not create the inequality which the appellant alleges."

Mercantile Bank v. New York, 121 U. S., at pages 159 and 160.

The present record shows precisely the contrary. It shows that, as between the national banks and

the trust companies there was nothing in respect of the modes of taxation applied to the two classes of institutions which this Court has denominated an "equivalency" of taxation. It shows that they were taxed under different laws; that the national banks were taxed in respect to their shares, while the trust companies were taxed in respect of their capital under a statute under which manufacturing companies are taxed; that the trust companies enjoyed an exemption from taxation in respect of so much of their capital and surplus as was invested in non-taxable securities of the United States and in other non-taxable bonds, and in respect of amounts due their depositors, and also in respect of ten per cent. of their capital stock, while in assessing the shares of the national banks for taxation no such deductions were made; and that the result was, as shown by the evidence and found by the referee, that "all of said trust companies, by reason of said deductions, were wholly free from assessment for taxation on their capital stock, except in the case of the said Nassau Trust Company, the capital stock of which was assessed at $6,361."

Referee's Finding, XXIV; Record, pp. 53, 54.

The disparity of the assessment, as between the trust companies and the national banks for the year in question, will be thrown into clearer light from the reading of the finding of the referee, No. XXVII,

Record, pp. 54, 55,

where it appears that the eight trust companies of Brooklyn, upon an aggregate value of capital, surplus and undivided profits amounting to $11,485,529.86, escaped taxation entirely except in respect

of the sum of $6,361; whereas the shareholders of the National and State banks of Brooklyn, upon an aggregate share valuation as fixed by the Board of Assessors for the taxing year in question, amounting to $6,495,100, after allowing deductions in respect of the individual indebtedness of the shareholders, were taxed upon the aggregate sum of $4,345,522. Thus, it appears, that while the trust companies wielded in capital, surplus and undivided profits nearly twice as much money in their banking business as the national banks of Brooklyn, yet the trust companies paid taxes on a little more than $6,000, assessed against one small trust company, while the shareholders of the national banks paid taxes on nearly four and one-half millions, the exact figures being $4,345,522. In the face of these startling figures can this Court say, as it said in the Mercantile Bank case, "We fail to find in the record any sufficient ground to believe that the rate of taxation, which, in fact, falls upon this form of investment of moneyed capital, is less than that imposed upon shares of stock in national banks." Can this Court conclude—pursuing further its language in that case —"That this mode of taxing trust companies does not create the inequality which the appellant alleges?"

This Court, in the Mercantile Bank case, *was in error as to the methods used by the assessors in New York* in ascertaining the value of the capital, surplus and undivided profits of a trust company. The Court says:

> "The actual value of the whole capital stock "is ascertained by a reference, among other "standards, to the market price of its shares so "that the aggregate value of the entire capital "may be the market price of one multiplied by "the whole number of shares."
>
> 121 U. S., 138, 160.

The Court then quotes Oswego Starch Factory *v.* Dolloway, 21 N. Y., 449, and People *v.* Commissions, 95 N. Y., 554.

This Court was justified in supposing that the market price of the shares in a trust company was a factor in determining the value of the capital of a trust company under the decisions quoted and other decisions of the Court of Appeals of New York, up to the year 1887, when the Mercantile Bank case was decided. But in 1891 the Court of Appeals of New York overturned this line of decisions in the celebrated case of the *People ex rel. Union Trust Company v. Coleman*,

126 N. Y., 433.

In that case the broad general rule to be applied in determining the value of capital stock was laid down as follows, on page 439:

> "There are reasons in abundance for the con-
> "clusion that by the phrase capital stock the
> "statute means *not the share stock*, but the
> "capital owned by the corporation, the fund
> "required to be paid in and kept intact as the
> "base of the business enterprise and the chief
> "factor in its safety. One ample reason is de-
> "rived from the fact that the tax is assessed
> "against the corporation and upon its prop-
> "erty, and not against the shareholders and
> "so upon their property. In theory every tax
> "is charged against some person, natural or
> "artificial, resident or non resident, known or
> "unknown. * * * Of course, it could only
> "be assessed and taxed in respect to its own
> "property, that which in its corporate charac-
> "ter it owned and possessed; and so it follows
> "inevitably that the statute concerns the
> "company's capital stock, that is, its real and
> "actual capital, *and not in any respect the*
> "*share stock which it does not own and*
> "*whose possessors have not been assessed.*"

The Court of Appeals of New York then pro-

ceeds to review and distinguish both of the cases cited by the Supreme Court of the United States, one of them on page 441 and the other on page 444.

It thus appears that this Court was proceeding on an erroneous theory in reaching the conclusion it did reach. This Court was fully justified in supposing that if, as indicated by these desisions, the New York assessors took into consideration the market price of the shares of a trust company, it would reach an amount of assessment substantially the same as though the shares were valued and taxed in the hands of the individual owners. But the Court of Appeals of New York having taken a new and radical departure four years subsequent to the decision in the Mercantile Bank case, and having laid down a rule which has resulted in these trust companies practically escaping taxation, the Mercantile Bank case must be clearly distinguished from the case at bar. This new departure of the Court of Appeals of New York was taken at the suit of one of the large New York trust companies, and, under the decision then made, the trust companies have ever since almost wholly escaped taxation, as indicated by the record in this case.

This Court says, in concluding its opinion regarding trust companies:

> "*Upon these grounds*, therefore, we are of opinion that this mode of taxing trust companies does not create the inequality that the appellant alleges."

We have thus shown that the two main premises taken by this Court regarding trust companies have now changed so as to be wholly favorable to the contention of the relators, and the conclusions arrived at in the Mercantile Bank case should, therefore, it is submitted, be held not to be binding in this case.

Since the Mercantile Bank case was decided, and prior to the time when the tax in controversy was assessed, the statute law of New York was so amended as to clothe the trust companies of that State with all the powers of banks, except the power of issuing circulating notes.

This Court in the *Mercantile Bank case* derived its conclusions of fact from an examination of the law. No facts were agreed upon as to how the trust companies in the State of New York, or in the taxing district of New York City, employed their capital, whether in banking or otherwise; but it was agreed "that any statutes of the United States, or of the State of New York may be cited and relied upon before the said Court, as if herein fully set forth."

> Mercantile Bank v. New York, 121 U. S., p. 144.

This Court thereupon, it seems, examined the statute law of New York, relating to trust companies, for the purpose of ascertaining and deciding the question of fact as to how they employed their capital, and whether they employed it in the business of banking, and hence in competition with the National Banks. "Trust companies," said this Court, "in New York, according to the powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word banking institutions. They have the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest; to accept and execute all trusts of every description committed to them by any person or corporation; to receive the title to real and personal estate on trusts created in accordance with the laws of the State, and to execute such trusts; to act as agent for

corporations in reference to issuing, readjusting and transferring certificates of stock and bonds and other evidences of debt; to accept and execute trusts for married women in respect to their separate property, and to act as guardian for the estates of infants. It is required that their capital shall be invested in bonds and mortgages on unencumbered real estate in the State of New York worth double the amount loaned thereon, or in stocks of the United States or of the State of New York, or of the incorporated cities of that State. It is evident, from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce."

Ibid., p. 159.

It thus appears that, no facts having been agreed upon or proved in the Mercantile Bank case as to how the trust companies of New York actually employed their capital, *this Court went to the laws of New York to find out what the facts were.* Although the statute law of New York had been, subsequently to the Mercantile Bank case and prior to the date when the present controversy arose, changed so as to confer upon trust companies in New York the usual powers of banks except the issuing of circulating notes, in other words so as to confer upon them the powers exercised by the State banks in that State,

New York Laws 1892, c. 689, § 156,—

as hereinafter set out; yet, ignoring this change in the law—ignoring the conceded fact disclosed by this record that the Brooklyn trust companies were exercising the powers conferred upon them,

Record, p. 78,

and that they were essentially banks, and that nearly all their business was that of banks,—nevertheless, all the judicial officers who took part in the decision of this case, from the referee to the Court of Appeals, ignoring the uncontroverted facts of this record—ignoring or attempting to explain away the change in the law, preferred to get the facts upon which to decide this case from the facts of the Mercantile Bank case, which facts, as just seen, this Court got from the law. This Court then got its facts from the law, and the New York judicatories in the case at bar got their facts from this Court, although the law had been amended so as—if law can create facts—to create an entirely new state of facts, and although the evidence in this case indisputably showed a state of facts contrary to that which this Court derived from the law in the Mercantile Bank case.

We know that laws, as well as constitutions, "march." Like modern corporations, they "migrate." They travel. They have no "commorancy." They "ambulate." Like errors, they "creep." They wriggle They crawl. But their vermiculations cannot always be traced. Their movements justify the observation of a great German poet, thus translated:

> "Laws, like inherited disease, descend,
> "And slyly wind their way from age to age,
> "And glide, almost unseen, from place to place."

But if laws, in thus descending, in thus winding their way, in thus gliding unseen, are permitted to carry a load of facts on their backs, then the celebrated lines will have to be paraphrased thus:

> "*Facts*, like inherited disease, descend,
> "And slyly wind their way from age to age,
> "And glide, almost unseen, from place to place."

If judicial officers can deliberately lay aside and ignore the facts of the case before them and go to another case for the facts on which to decide the case in hand, go to another case decided long before; to a case with which the parties to the present case were in no sort of privity; go to that case to get their facts; then, what are we coming to? Is there to be any end to fantastic novelties in judicial administration?

The doctrine of *stare decisis* does not extend to the decision of mere questions of fact; the doctrine of *res judicata* does. If the rule of *stare decisis* extended to the decision of questions of fact, then it would extend to the verdicts of juries, and it would make the verdict of a jury in a controversy between Smith and Jones, conclusive upon the whole world, and it would make such a verdict furnish a test by which to determine the rights of all mankind. The bare statement of such a proposition shows its absurdity. The question of fact decided in *Mercantile Bank* v. *New York*, was decided for the purposes of that litigation only and for the purpose of disposing of the rights of the parties to that record only. As to the parties to this record, it is *res inter alios acta* and of no effect whatever. But here, if the New York judicatories are correct, the facts discovered in one case are to govern the rights of the whole world, and throughout the mutations of all time.

Since the rendition of the decision in the Mercantile Bank case the Statute Law of the State of New York has been changed so as to confer upon trust companies all the essential powers of banks except the issuing of circulating notes, which power a State bank could not exercise because of the taxing clause in the National banking law;

and it stands admitted by the respondents (defendants-in-error here) upon this record, that the eight trust companies of Brooklyn were in the exercise of all the powers conferred upon them by the Statute Law of New York. The language of this admission by the learned counsel for the respondents (defendants in-error here) is again called to the attention of tnis Court. "I concede that these trust companies, and every trust company exercises all the powers conferred upon it by Statute."

Record, top of p. 78.

Now what were these powers?

By the New York Banking Law of 1892, Laws 1892, ch. 689, § 156, trust companies organized under the statute have the power:

* * * * * *

"2. To *receive deposits* of trust moneys, securities, and other personal property from any person or corporation, and to loan money on real or *personal security*.

* * * * * *

"9. *To purchase, invest in* and *sell stocks, bills, of exchange, bonds, mortgages* and *other securities;* and when moneys or securities for moneys are borrowed or *received* on *deposit*, or for investment, the bonds or obligations of the company may be given therefor; but it shall have no right to issue bills to circulate as money."

By Section 162 of the same statute, "every trust company incorporated by a special law shall possess the powers of trust companies incorporated under this chapter, and shall be subject to such provisions of this chapter as are not inconsistent with the special laws relating to such specially chartered company." This statute was enacted

after the decision of the Supreme Court of the United States in *Mercantile Bank* v. *New York*, 121 U. S., 138, which was rendered in 1887.

By the statute amendatory of the New York "Act in relation to Banking Corporations,"

New York Laws of 1893, Ch. 696, § 3,

Section 156 of Chapter 689 of the Banking Law of 1892 is so amended as to confer upon trust companies the following powers:

"11. To exercise the powers conferred on individual banks and bankers by Section 55 of this act, subject to the restrictions contained in said section."

On turning to Section 55, here referred to, we find that it provides:

"Every bank and individual banker doing business in this State may *take*, *receive*, *reserve* and *charge* on *every loan* or *discount made*, or *upon any note*, *bill of exchange*, or *other evidence of debt*, interest at the rate of six per cent. per annum; and such interest may be taken in advance, reckoning the days for which the *note*, *bill*, or *evidence of debt* has to run."

Then follows a statement of the penalties denounced for taking usurious interest, and then the following:

"The *purchase*, *discount*, or *sale of a bona fide bill of exchange*, *note*, *or other evidence of debt*, payable at another place than the place of such purchase, discount, or sale at not more than the current rate of exchange for sight drafts, or a reasonable charge for the collection of the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than six per cent. per annum. The true intent and meaning of this section is, to place and continue

banks and individual bankers on an equality in the particulars herein referred to, with the national banks organized under the act of Congress entitled, 'An Act to Provide a National Currency, Secured by Pledge of United States Bonds, and to Provide for the Circulation and Redemption Thereof,' approved June 3, 1864."

By the express words of the statute of the State of New York, Trust Companies are here put on an equality with National Banks with respect to great and important banking powers.

Here is a grant, by the most necessary implication, of the *power* to *loan money*, to *discount notes, bills of exchange*, and *other evidences of debt*, and *to purchase, discount* and *sell bills of exchange* or *other evidences of debt*. By enacting a statute which, in express terms, makes trust companies subject to these regulations, the legislature intends that such companies already possess, or shall possess, the powers which the statute assumes to regulate; since it would be absurd for the legislature to enact a statute with express reference to trust companies, regulating the exercise of a power by them which the legislature has never conferred upon them. Under the maxim of statutory construction *ut res magis valeat quam pereat*, statutes are construed so as to save all their parts, and so as to ascribe a meaning to every portion of them when it can possibly be done; but, as this is a separate section in the amendatory statute, standing alone and relating to a subject which has no reference to the other portions of the amendatory act, the refusal to ascribe to trust companies the powers which this section assumes to regulate in their hands would have the effect of striking the section out of the statute—in other words, not merely of refusing to give effect to all the parts of a statute, but of destroying the statute

entirely—turning it into absurdity—rendering it totally nugatory—striking it out of existence.

The cases are numerous where powers have been ascribed to corporations by the operation of acts of the legislature which merely recognize the existence of such powers in such corporations.

> Shaw *v.* Norfolk R., &c. Co, 5 Gray (Mass.), 162, 179; Richards *v.* Merrimac, &c., R. Co., 44 N. H., 127, 136.

And there are cases where, in the entire absence of proof of a charter creating a corporation, or of its formation under a general enabling act, its *de facto*, and even its *de jure* existence, has been proved by acts of the legislature which necessarily recognize such existence.

> Comanche County *v.* Lewis, 133 U. S., 198; Com. *v.* Westchester Co., 3 Grant Cas. (Pa.), 200; Atkinson *v.* Bemis, 11 N. H., 44; Colburn *v.* Ellenwood, 4 N. H., 101; Meade *v.* New York, &c., R. Co., 45 Conn., 199; McCauley *v.* Columbus, &c., R. Co., 83 Ill., 348, 352; White *v.* Ross, 4 Abb. App., Dec. (N. Y.), 589; Atlantic, &c., R. Co. *v.* St. Louis, 66 Mo., 228; Jameson *v.* People, 16 Ill., 257.

It is further submitted that this statutory enumeration of powers embraces all the ordinary business of banking, except the issuing of notes intended to circulate as money. In respect of this office of issuing circulating notes, all State banks are placed on the same footing by the taxing clause of the National Banking Act, which was intended to drive the currency of the State banks out of ex-

istence, and which has notoriously accomplished that purpose. In the case on the State taxation of national banks which influenced the decision of all the judicatories of the State of New York which took part in the decision of the case at bar, it is said: "The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money, where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the Government, State and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it, in the eye of this statute, 'moneyed capital.' Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress."

Mercantile Bank *v.* New York, 121 U. S., 138, 156.

And this Court held in that case that, as the New York trust companies did not carry on these operations—at least as the principal part of their business—they were not in competition with the banks within the meaning of the Federal statute in question. That case, as we have said, was decided upon an agreed statement of facts. There was not one word in that agreed statement as to the nature of the business carried on by the New York trust companies. The Court inferred the nature of that business wholly from the statute of New York—

as it then existed, in the year 1887—defining the powers of trust companies. We have now shown that trust companies have the power, under the present statute law of New York, to carry on all the functions of banking except the issue of circulating notes; and it was admitted in this case at the hearing before the Referee, by counsel for the respondents, that they exercise all the statutory powers which they possess.

Record, pp. 78, 79.

And, in point of fact, it was proved that almost the entire volume of their business was banking, pure and simple, and that but a small fraction of it was the business appropriate to trust companies—that is, acting as trustee for individuals, corporations, widows, orphans, litigants, etc.

But if we rest the question, as did this Court, upon their statutory powers merely, we shall see that they possess every power enumerated by that Court as going to make up "the business of banking."

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand intended to circulate as money, where the banks are banks of issue." But no State bank, as just seen, has that power in point of fact. "*In receiving deposits, payable on demand.*" The power to receive deposits is expressly conferred by the language above quoted, and it has been shown that by far the greater portion of the deposits of three of the leading Brooklyn trust companies are so payable—not five per cent. being trust deposits. "*In discounting commercial paper.*" This power is conferred upon trust companies in this State by the words "to purchase, invest in and sell stocks, *bills of exchange*, bonds and mortgages and *other securities*," there being, as shown by

the evidence in this case, no substantial distinction between discounts and purchases. It is also conferred, by the clearest implication, in the language above quoted from original Section 55, ascribed by the amendatory act to trust companies. "*Making loans of money on collateral security.*" This power is expressly conferred in the language of Subsection 2 above quoted, "to loan money on real or personal security," to say nothing of the language of original Section 55 expressly ascribed to trust companies by the amendatory act. "*Buying and selling bills of exchange.*" This power is conferred by Subsection 2, above quoted, the language being "to purchase, invest in and sell stocks, *bills of exchange*," etc. "*Negotiating loans and dealing in negotiable securities issued by the Government, State and national, and municipal and other corporations.*" All these powers are conferred in the language of Subsection 9, above quoted, "to purchase, invest in and sell stocks, bills of exchange, *bonds* and *mortgages* and other securities." And this Court adds: "These are the operations in which the capital invested in national banks is employed, and it is the nature of that employment which constitutes it in the eye of this statute, 'moneyed capital.' *Corporations and individuals carrying on these operations do come into competition with the business of national banks, and capital in the hands of individuals thus employed is what is intended to be described by the act of Congress.* * * * The terms of the act of Congress, therefore, include shares of stock or other interests owned by individuals *in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money.* The moneyed capital

thus employed is invested for that purpose in securities by way of loan, discount or otherwise, which are, from time to time, according to the rules of the business, reduced again to money and reinvested."

Mercantile Bank *v.* New York, 121 U. S., 138, 156, 157.

The evidence in this case precisely and pointedly shows that nearly all the capital employed by the Brooklyn Trust Companies is used in the way described by this language, and there is not a scintilla of evidence to the contrary.

This Court then, from one of its previous decisions,

Evansville Bank *v.* Britton, 105 U. S., 322,

gave the definition of "moneyed capital," within the meaning of Section 5219 of the Revised Statutes of the United States, as follows: "Credits, money loaned at interest, and demands against persons or corporations are more purely representative of moneyed capital than personal property, so far as they can be said to differ. Undoubtedly, there may be said to be much personal property exempt from taxation without giving bank shares a right to similar exemption, because personal property is not necessarily moneyed capital. But the rights, credits, demands and money at interest mentioned in the Indiana statute, from which *bona fide* debts may be deducted, all mean moneyed capital invested in that way."

"This definition," add the Court in the later case, "of moneyed capital in the hands of individuals, seems to us to be the idea of the law, and ample enough to embrace and secure its whole purpose and policy."

Mercantile Bank *v.* New York, 121 U. S., 136, 157.

Everyone of these powers, thus enumerated as the business of banking and ascribed to National banks, is not only possessed, under the law of New York, by trust companies, but, in point of fact, nearly all the capital of the eight Brooklyn trust companies—at least ninety-five per cent. of it—was employed in exercising these very powers; and the capital so employed was "moneyed capital," and, as such, was employed in direct competition with the "moneyed capital" employed in the same way by the National banks.

It is then submitted that, this Court having, in the Mercantile Bank case, inferred from the then state of the statute law of New York, with respect to trust companies, the manner in which those companies employed their capital, with the conclusion that they were not banks in the commercial sense of the word, this Court should now, by the same process of reasoning, infer that the trust companies of New York were, at the time when this controversy arose, essentially banks in the commercial sense of the word, and employed their capital in the ordinary operations of banking, and hence in competition with the First National Bank of Brooklyn, wherein these relators (plaintiffs in error here) are shareholders. We more especially ask this in view of the concession made at the trial before the Referee by counsel for the respondents (defendants in error here), that every trust company exercises all the powers conferred upon it by statute.

Record, p. 78.

If, in construing the above Statutes, the New York judicatories have held that they did not operate to confer upon the eight trust companies of the then City of Brooklyn the banking powers which this record incontestably shows they were

habitually exercising, then our contention is that a Federal right cannot be stricken down by the erroneous decision of a State Court in construing a State Statute; but that, where a right under a Statute of the United States is involved, this Court will not be bound by the decision of a State Court in construing its own Statutes, as it would where the question presented is a question of ordinary municipal law; but that it will look to its real meaning independently of the State Court, and will give effect to its real meaning in so far as it may be necessary to preserve the Federal right.

> Huntington v. Attrill, 146 U. S., 657, 683, 684.
>
> Mobile, &c., R. Co. v. Tennessee, 153 U. S., 486, 492.
>
> Scott v. McNeal, 154 U. S., 34, 45.
>
> Jefferson Bank v. Skelly, 1 Black (U. S.), 436, 443.
>
> Douglas v. Kentucky, 168 U. S., 458, 502.

Ideas are sometimes clarified by looking at a question from a new point of view. In the case of *State v. Lincoln Trust Company*,

> 144 Mo., 562, 585,

the Supreme Court of Missouri, finding that certain trust companies, organized under the Missouri statute, were engaged in banking, and that the Missouri statute was substantially the same as the New York statutes described in the Mercantile Bank case,

> Mercantile Bank v. New York, 121 U. S., 138,

followed the decision of this Court in that case,

wherein it held that the trust companies of New York were not banks in the commercial sense of the word, and did not perform the functions of banks in carrying on the exchanges of commerce. *It therefore ousted said trust companies of the exercise of the banking powers which they had usurped.* Suppose that the Missouri statute had been amended as the New York statute has been amended since the decision in the Mercantile Bank case, by adding the qualifying clauses hereinbefore set out, would or could the decision of the Missouri Supreme Court have been a judgment ousting them of their banking powers? How could a Court, in a proceeding brought by the Attorney-General, oust a corporation of powers the possession of which the Legislature had expressly recognized and regulated? Could any Court on earth grant or sanction such a judgment? Looking at the case from this point of view, putting the question to this test, the mind is overwhelmingly impressed with the conclusion that, in the year 1897, under the statute law of New York, relating to trust companies, as thus amended, the eight Brooklyn trust companies were rightfully exercising the banking powers which constituted nearly all their business. They were not only banking corporations *de facto*, but they were such *de jure*. But what difference could it make to these relators whether they were rightfully or wrongfully exercising those powers? So long as the State of New York permitted them to exercise those powers and at the same time to escape taxation upon their capital, their surplus, and their undivided profits, while it laid a heavy tax upon the shares of the National banks, were not the shareholders of the National banks taxed at a greater rate than the taxation of other moneyed capital in the hands of individual citizens

of the State within the same taxing district, within the same taxing district, within the language and meaning of Section 5219 of the revised statutes? It was the *fact* and not the *theory* from which they suffered.

The case at bar is, therefore, distinguishable from the Mercantile Bank case upon four vital grounds:

The case at bar is, therefore, distinguishable from the Mercantile Bank case upon four vital grounds:

1. It was not shown in the Mercantile Bank case that the trust companies within the taxing district were essentially banks and that the principal part of their business was mere banking; it was so shown in this case with respect to the trust companies within the then City of Brooklyn, which was the taxing district.

2. It was not shown in that case that, if the trust companies were banks, there was any inequality of taxation as between them and the shareholders of the national banks, prejudicial to such shareholders; it was shown in this case that there was such an inequality, and so great as to leave the shareholders in the national banks heavily taxed, while the trust companies enjoyed substantially a total exemption from taxation, except upon their real estate.

3. This Court, in deciding the Mercantile Bank case, proceeded upon an error of fact as to the methods used by the tax assessors in New York in ascertaining the value, for the purposes of taxation, of the capital, surplus and undivided profits of the trust companies, which mistaken premise led to the mistaken conclusion that the mode of

taxing trust companies did not create the inequality, as between them and the national banks, which the appellant alleged in that case; whereas the record in this case shows that it does create that very inequality.

4. Since the Mercantile Bank case was decided, and prior to the time when the tax in controversy was assessed, the statute law of New York was so amended as to clothe the trust companies of that State with all the powers of banks, except the power of issuing circulating notes.

III. All of the Trust Companies in the City of Brooklyn Enjoyed a Statutory Exemption of Ten Per Cent. of the Amount of their Capital, and this Exemption was not Enjoyed by Banks. Under the doctrine laid down in *Whitbeck* v. *Mercantile Bank* (127 U. S., 193), a difference of *five per cent.* in the valuation of the capital of National Banks over that of other personal property was held to be an unlawful discrimination. This statutory discrimination in the New York State law has never before been challenged in any Court, so far as we are aware.

It is purely arbitrary; it is based upon no conceivable principle of justice or equality. It is "*an unfriendly discrimination*" within the language of this Court.

Adams v. Nashville, 95 U. S., 19.

It is an exemption from taxation of "*a very material part, relatively*, of other moneyed capital in the hands of individual citizens within the same

jurisdiction or taxing district," within the language of another decision of this Court.

Boyer v. Boyer, 113 U. S., 689, 693.

It is an exemption of "*a very material portion of other moneyed capital* in the hands of individual citizens and corporations," within the language of this Court in the same case.

Boyer v. Boyer, 113 U. S., 689, 694.

It is an "inequality so palpable as to show that *the discrimination* against capital invested in such [national bank] shares *is serious*;" and, therefore, "the Courts have *no discretion but to interfere*."

Boyer v. Boyer, 113 U. S., 701.

Can this Court read the disclosures of this record with regard to the enormous business of mere banking carried on by the Brooklyn trust companies and entertain any doubt upon this question?

Why should the shareholders in the Brooklyn Trust Company, with its nearly eleven millions of general individual deposits,

Record, p. 49,

enjoy this arbitrary exemption from taxation, and the shareholders in the First National Bank (relators and plaintiffs in error here) not enjoy it?

Why should the shareholders of the Hamilton Trust Company, with its more than four million dollars of "indebtedness due depositors,"

Record, p. 53,

enjoy this exemption and we not enjoy it?

Why should the shareholders of the People's

Trust Company with its general deposits in the aggregate of nearly six million dollars, and its amount of trust funds less than three hundred thousand dollars,

Record, p. 55,

enjoy this exemption, and we not enjoy it?

Why should the Franklin Trust Company with its more than five million dollars of general deposits and less than two hundred thousand dollars of deposits in trust,

Record, p. 55,

enjoy this exemption, and we not enjoy it?

Why should the Manufacturers' Trust Company with its more than two and one-half millions of general deposits and its less than twenty-five thousand dollars of deposits in trust,

Record, p. 56,

enjoy this exemption, and we not enjoy it?

Why should the other three Brooklyn Trust Companies, engaged there in the business of banking, enjoy this exemption, and we not enjoy it? As between a manufacturing corporation or a gas light corporation and a national bank, this exemption might not be regarded as fatal; but as between financial institutions competing with each other in the business of banking, in the same taxing district, how can it be regarded as other than a taxation of one class of such institutions which does not enjoy this exemption, "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," within the meaning of Section 5219 of the Revised Statutes of the United States?

IV. The Referee Found, in Substance, though not in Form, that the Shares of the Eight Trust Companies of the then City of Brooklyn were "Moneyed Capital" in the hands of Individual Citizens of the State of New York, within the Meaning of Section 5219 of the Revised Statutes of the United States, and Judgment is Invoked on that Finding.—It is true that the Referee refused, in the findings which he was requested to make, to use the words "moneyed capital," but changed it to "money as capital."

Record, p. 54,

yet the two expressions mean essentially the same thing; and hence the findings as made by him are the findings upon which we were entitled to invoke the favorable judgment of the Court below, and on which we are entitled to invoke the favorable judgment of this Court. These findings as thus changed by the Referee read as follows:

> "XIV. That the following trust companies "did business within the City of Brooklyn "where the said First National Bank of Brook- "lyn is located, namely:
>
> "[Reciting the names of the eight trust "companies of Brooklyn]; and the capital "stock of said trust companies is divided into "shares, and is owned and held by various "individuals and corporations residing in the "Borough (late City) of Brooklyn and else- "where; and the said trust companies and "the stockholders therein *use money as "capital.*"

This finding, as the Referee was requested to make it by the relators (plaintiffs in error here),

had for the concluding words "used and employed *moneyed capital*,"

Record, p. 48.

The other requested finding, as thus charged by the Referee and then found by him, was as follows:

> "That the owners and holders of the shares "of the capital stock in each and all of such "trust companies within the State of New York "are 'individual citizens' using and employing "'money' for profit by its use as money. That "the shares of stock of such trust companies "in the hands of the owners or holders thereof "are exempt from taxation under Subdivision "16, of Section 4, of 'the Tax Law,' Chapter "908 of the Laws of 1896 of the State of New "York, which reads at follows: 'The owner "or holder of stock in an incorporated com- "pany liable to taxation on its capital shall "not be taxed as an individual for such "stock.' "

Record, p. 54.

Unless there is some deep and metaphysical distinction between using "money as capital," as changed in the first of these findings, and using and employing "moneyed capital;" and using and employing "money" for profit by its use as money, and using and employing "moneyed capital" for profit by its use as money, then we are entitled to invoke the favorable judgment of this Court upon these findings, as the Referee changed them and as they stand. It is submitted that there is and can be no distinction between using and employing "moneyed capital" and "using money as capital;" nor any distinction between employing "moneyed capital" for profit by its use as money, and using and employing money for profit by its use as money. The change of expression made by the Referee involves no change of meaning. The

two forms of expression conduct the mind essentially to the same thing. No difference of meaning between the two expressions can be imagined. If the eight trust companies of the taxing district of the then City of Brooklyn were using money as capital, then they were necessarily using it in competition with the national banks; and if they were using money "for profit by its use as money," then the same conclusion undissuadably forces itself upon the mind. What casuistry, what subtlety, what metaphysical aid, what hairsplitting, can discover any difference between these forms of expression and lift this case out of the inevitable conclusion where the fanciful changes made by the Referee have landed it and left it. The definition made by this Court of the meaning of the expression "moneyed capital," as used in Section 5219 of the Revised Statutes of the United States, affords no ground for such a fanciful distinction; but the use of "money" by the trust companies which the Referee has above found, answers absolutely to that definition.

Mercantile Bank v. New York, 121 U. S., 138, 156, 157.

V. Error of the Referee in Holding "as Matter of Fact" that the Eight Trust Companies of Brooklyn were not in Competition with the National Banks of Brooklyn.—The fifth assignment of error made by the plaintiffs in error in this Court is in the following language: "That the Court below erred in sustaining so much of the report of the Referee where in he found, 'as matter of fact,' on the evidence before him, that the trust companies

therein named were not in competition with National Banks within the sense and meaning of the words of Section 5219 of the Revised Statutes of the United States, so as to make their shares of stock 'other moneyed capital in the hands of individual citizens.' *The finding was not a 'matter of fact,' but was a conclusion of law* to be drawn from established facts, involving the interpretation of the Federal Statutes; hence the plaintiffs in error are not concluded in this Court by the frame of language employed by the Referee in making this finding.

It is, of course, understood that this Court does not, on a writ of error, weigh conflicting evidence. It is prohibited by Statute from doing so.

Rev. Stats., U. S., § 1011.

But in construing this Statute this Court has used the following language:

"If the finding depends upon the weighing of "conflicting evidence, it was a decision on the "facts, the revision of which is forbidden to this "Court by Section 1011. If the question was "whether all the evidence was sufficient in law to "warrant a finding for the plaintiff, he should "have presented that question by a request for a "definite ruling upon that point."

Martinton v. Fairbanks, 112 U. S., 670, 672.

That is precisely what the relators (plaintiffs in error here) did in the present case. The Referee was requested to make, but refused to make, the following finding:

"The moneyed capital thus used and employed "by said trust companies and the stockholders "therein, is invested for that purpose in securities "by way of loan, discount and otherwise, which "are from time to time, according to the rules of

"business, reduced again to money and reinvested. "The said trust companies are corporations in "which individual citizens own the shares of stock, "and the capital of said companies, employed in "carrying on its business, is money, and the ob- "ject of such business is the making of profit by "its use as money; and the said trust companies "and the stockholders therein so using and em- "ploying moneyed capital as aforesaid come into "direct competition with the national banking "associations and the stockholders therein in "their use and employment of moneyed capital."

Record, p. 49.

There was a mass of evidence, oral and statistical, delivered before the Referee, supporting this finding, and there was not a word, nor a line, nor a hint in opposition to it; nor was there any suggestion of infirmity or partiality on the part of any of the witnesses, three of whom were the presumably disinterested officers of trust companies. Some of their testimony is largely in the language of the above requested finding.

See the testimony of Mr. Sniffen, Record, p. 78; of Mr. Cowing, Record, p. 79; of Mr. Johnson, Record, pp. 79, 80.

These three officers of trust companies testified they they carried on their banking business substantially as the banks do, lending money on collateral security and buying commercial paper. A form of collateral note used by one of them in lending money was put in evidence,

Exhibit 10, Record, p. 105,

and is similar, though more detailed, than one which was used by one of the Brooklyn national banks.

Exhibit 9, Record, p. 104.

For the statistical evidence which was offered by the relators (plaintiffs in error here), and received by the Referee, for the purpose of showing that the trust companies of Brooklyn employed their capital chiefly in banking and only to a small extent in trust business, three representative trust companies were selected, and their condition on the first day of May, 1897, the day fixed by law for assessing property for taxation, was disclosed in dollars and cents. They were great trust companies, as shown by the figures, and may be presumed to be representatives of the others. According to the evidence and the findings of the Referee, the People's Trust Company held on that day:

Trust funds amounting to.....	$272,918.52
General deposits.....	5,038,623 64
Time certificates...	30,424.30
Demand certificates of deposit.....	833,989.06

Record, p. 55.

Against this it had loaned out on collateral the enormous amount of.....	$3,901,689.88
Amount loaned on personal security, including bills purchased.....	302,896.55

Record, p. 55.

General deposits.....	$5,038,623.64
Time certificates.....	30,424.30
Demand certificates of deposit.....	833,989.06
Making a total of deposits of.....	$5,903,037.00

The Court will no doubt take judicial notice that all the words in this statement are the ordinary words employed in banking except those relating to the trust funds held by the company. A calculation will show that *less than five per*

cent. of this great volume of deposits consisted of trust funds, and that *more than ninety-five per cent.* of them consisted of mere banking deposits.

According to the evidence and the findings of the Referee, the Franklin Trust Company had, on the same day:

Deposits in trust	$ 187,162.93
General deposits	5,013,703.02
Amount loaned on collateral	$1,721,932.44
Amount loaned on personal security, including bills purchased	505,996.05

Record, p. 55.

A similar calculation will show that, against this more than five million dollars of general deposits, this company had *less than four per cent.* of deposits in trust, and *more than ninety-six per cent.* of general deposits; while it had loaned out on collateral more than a million and a half, and on personal security, including bills purchased, four hundred and sixty thousand and odd dollars.

In like manner the finding of the Referee, based upon uncontroverted evidence, shows that the Manufacturer's Trust Company had on the same day:

Deposits in trust	$23,443.89
General Deposits (including time and demand certificates)	2,661,466.82
Amount loaned on collateral	$1,236,521.25
Amount loaned on bond and mortgage and bills purchased	359,120.88

Record, top of p. 56.

A calculation will show that this trust company, with more than two millions and a half of

general deposits (including time and demand certificates), had of deposits in trust *less than one per cent.* of this amount, that is to say, its general deposits were *more than ninety-nine per cent.* of all its deposits. Against this it had loaned on collateral one million two hundred and thirty-six thousand and odd dollars, and on bond and mortgage and bills purchased three hundred and fifty-nine thousand and odd dollars.

And yet, in the face of these undisputable figures, the Referee refused the finding above set out, to the effect that the trust companies were not in competition with the national banks in the business of banking. A trust company whose trust business is in volume less than five per cent. of its banking business, another trust company whose trust business is less than four per cent. of its banking business, and another trust company whose trust business is less than one per cent. of its banking business, are not in competition with a national bank situated in the same city and taxing district. In the aggregate, less than four per cent. of the business of these three great trust companies was trust business: the rest, more than ninety-six per cent. in the aggregate, was banking business: and yet they were not in competition with the national banks in the business of banking! No.

It is submitted that the findings of the Referee that there was no such competition, and his findings of the statistical facts with regard to the business of these three great trust companies are absolutely contradictory and self-stultifying, and consequently that the Court below erred in confirming those findings.

If it is suggested or argued that these three trust companies ought not to be regarded as representa-

tive of all the Brooklyn trust companies, and that the above statistics of these three companies ought not to carry the conclusion that all the Brooklyn trust companies were, on the date in question, engaged chiefly in the business of banking and but little in the business of taking care of trust funds, then we say that the tax returns of at least two of the other five trust companies, made for that year to the Board of Assessors of the City of Brooklyn, as found and set out in detail by the Referee, tell the rest of the story.

> The tax returns of all of the eight Brooklyn trust companies, made to the Board of Assessors of the City of Brooklyn for the year 1897, as found and set out by the Referee, are given on pp. 49 to 53 of the Record.

The Brooklyn Trust Company, the largest of all the Brooklyn trust companies, returned as "general individual deposits" the enormous sum of $10,739,505.13.

Record, p. 49.

The Hamilton Trust Company returned as "indebtedness due depositors" the great sum of $4,316,996.37.

Record, top of p. 53.

Two others of the five not previously considered did not return the amounts due depositors, but returned merely "general indebtedness,"

Record, p. 50,

or "indebtedness," in amounts not so large, but perhaps equally large relatively to their gross assets; and the last of the eight did not return any indebtedness,

Record, p. 53,

and was the only one which suffered any taxation on its capital, and that only on the sum of $6,361.

Record, p. 50.

If any significance can be given to these tax returns, then we must conclude that the Referee has found that a trust company having nearly eleven million dollars in "general individual deposits," and another trust company having nearly four and one-half millions of "indebtedness due depositors," are not in competition with the National banks of Brooklyn in the business of banking.

VI. Disparity of Assessment between the Brooklyn Trust Companies and the National Banks.

It will be recalled that this Court in the case of *Mercantile Bank v. New York*,

121 U. S., p. 159.

while conceding that the trust companies received money on deposit, invested it in loans, and so dealt, therefore, in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals as used in the Act of Congress—nevertheless said: "But we fail to find in the Record any sufficient ground to believe that the rate of taxation which, in fact, falls upon this form of investment of moneyed capital, is less than that imposed upon shares of stock in national banks." That the record did not show that there was any discrimination, or any unfriendliness as to taxation in favor of the State trust companies as against the national banks. That was the deduction of this Court in the entire absence of specific facts. With the

glaring array of facts before him already set out, the *Referee in the present case, and all the judicatories* of the State of New York which followed him and affirmed his conclusion, took the same view. The Referee said: "Admitting this, however [that the coin held by the First National Bank of Brooklyn was a part of its capital invested in non-taxable property], it might be stated that the deduction allowed trust companies by Section 12, Article 1, Chapter 908, of the [New York] Laws of 1896 (General Tax Law), and not National Banks, would render the rate of taxation unequal; but in view of the Tax Law [of New York], Article 9, whereby it appears that trust companies pay a franchise tax, while banks do not, and in view of the restrictions of the banking law upon investments and use of their capital and money by trust companies, which do not apply to National banks,—it cannot be said that the Legislature has, for this reason only, discriminated against National banks in favor of trust companies, within the decisions of the United States Supreme Court."

Record, p. 101.

It is submitted here that the very contrary can be said, and upon the facts of this record must be said. It should also be remembered that this view of the Court in the Mercantile Bank case was also based on an erroneous understanding of the method of assessment in New York State prior to the decision in the Union Trust Company case (126 N. Y., 433).

What was this franchise tax which is supposed to offset the other gross inequalities of taxation disclosed by this record? This record does not show the amount of it which was assessed against

each of the eight Brooklyn trust companies for the taxing year 1897; but this Court can look to the Statute under which it was assessed and draw its conclusion, as it did in the Mercantile Bank case. It was a tax of "*one-quarter mill upon the capital stock for each one per centum of dividends;*" and if no dividends have been declared, then a tax of *one and a half mills upon each dollar of valuation of capital stock* made in a prescribed manner. An infinitesimal tax. To avoid any mistake as to this, the statute is below set out:

"The Tax Law," Chapter 908, Laws of New York "of 1896, § 182 reads: "FRANCHISE TAX ON CORPORATIONS. Every corporation, joint stock company or association incorporated, organized, or "formed under, by or pursuant to law in this State, "shall pay to the State Treasurer annually an annual tax to be computed upon the basis of the "amount of its capital stock employed within this "State and upon each dollar of such amount "at the rate of one quarter of a mill for each one "per centum of dividends made and declared upon "its capital stock during each year ending with the "31st day of October, if the dividends amount to "six or more than six per centum upon the par "value of such capital stock. If such dividend or "dividends amount to less than six per centum on "the par value of the capital stock, the tax shall "be at the rate of one and one-half mills on such "portion of the capital stock at par as the amount "of capital employed within this State bears to the "entire capital of the corporation."

There are other provisions designed to reach non-dividend paying corporations which do not affect the trust companies, all of which pay large dividends.

The conclusion is unavoidable that the amount of this franchise tax, laid in that year against each of the Brooklyn trust companies, must have been a mere bagatelle; not more than enough to

offset the small Federal tax which the National banks pay upon their circulation.

VII. The Assessment in this Case is Void, for the Reason that the National Banks were Assessed upon a Different Principle from that on which the Trust Companies were Assessed.

Having shown that the trust companies of Brooklyn are banks to all intents and purposes, using their money precisely as banks do, it follows under the interpretation of Section 41 of the National Banking and Currency Act (Rev. Stat. U. S., Sec. 5219), as made by this Court in the leading case of *Van Allen* v. *Assessors*,

3 Wall. U. S., 573, 581,

that the tax laid upon the shares of the relators in this case is wholly void, for the reason that they were taxed on a different principle, under a different scheme of taxation, and under a different taxing law from that employed in the case of the trust companies existing and doing business within the same taxing district. In the case just cited, a statute of New York, called "The Enabling Act," was held not to conform to the Federal statute just referred to, by reason of this defect, as stated in the opinion of this Court, delivered by Mr. Justice Nelson:

> "One of the limitations in the act of Congress is 'that the tax so imposed under the laws of any State shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located.'"

It will be recalled that this proviso was in the National Banking Act (Section 41) as originally enacted, but was left out of the act as amended; but it is submitted that the difference is immaterial, since the act as amended retains the clause, "but not at a greater rate than is assessed upon other moneyed capital of individual citizens in such State," and that the principle laid down governs. "The Enabling Act of the State," said Mr. Justice Nelson, "contains no such limitation. The banks of the State are taxed upon their capital; and, although the act provides that the tax on the shares of the national banks shall not exceed the par value, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders."

Van Allen *v.* Assessors, 3 Wall. (U. S.), 573, 581.

By parallel reasoning it may be said that the trust companies of this State are taxed upon their capital, and that the taxing act applicable to the national banks does not limit the taxation of their shares to their par value, but taxes them at their actual value, which may be, as in the present case, greatly in excess of their par value; and that the capital of the trust companies may, and largely does, as shown by this record, consist of the bonds of the United States, which are exempt from State taxation. "It is easy to see that this tax upon the capital of the trust companies is not an equivalent for a tax on the shares of the stockholders" [of the national banks]. This record discloses as a fact that the two forms of taxation are not in any sense or to any degree equivalent for each other. The

trust companies enjoy the following exemptions which the national banks do not enjoy: ten per cent. of their nominal stock; all of their assets which are invested in United States bonds; all of their assets which are invested in other non-taxable bonds. On the other hand, under the taxing law applicable to banks, as interpreted by the Court of Appeals of New York and as actually administered by the taxing officers of New York, everything is thrown together that can swell the aggregate *de facto* capital of the National bank; its nominal capital, its surplus, its reserve fund, the actual value of its real estate; and from this aggregate one item alone is deducted, namely, the assessed—not the actual—value of its real estate. The aggregate capital remaining is apportioned upon the shares by dividing it by the whole number of the shares; and the tax, as so apportioned, is collected from the bank. The result, roundly stated, is that the National banks are heavily taxed, while the trust companies escape taxation entirely, except in respect of their real estate.

The decision in *Van Allen* v. *Assessors* has always been followed by this Court. The principle there declared is that a State taxing law which taxes National banks on one principle and State banks on a different principle, which *may* result in an inequality as between them, is void, as being in contravention of the National Banking Act, which is the supreme law of the land, any State law to the contrary notwithstanding. The trust companies are banks; they are taxed upon a different principle from the National banks, and this *does* result in an inequality of taxation as between them. The doctrine of *Van Allen* v. *Assessors*, therefore, necessarily ends this case in favor of the relators (plaintiffs in error here).

VIII. The Court below Erred in Overruling an Exception Made by these Relators (Plaintiffs in Error in this Court) to the Ruling of the Referee wherein he Refused to Allow the said Relators to show that the National Banks existing in the City of Brooklyn, in Point of Fact, Suffered from the Unfriendly Competition of the Trust Companies Existing in that City.

At the hearing before the referee, in the examination of Mr. W. Addison Field, cashier of the First National Bank, whose shareholders these relators are, the following questions were asked:

"Did your bank, at any time within the last ten years, commence paying interest to depositors?"

This question was admitted by the referee notwithstanding the objection and exception of counsel for the respondent, and the answer was "yes."

Record, p. 76.

Then the two following questions were asked and excluded:

"Q. What induced your bank to take that action?"

"Q. Up to the time when you began to allow interest on deposits, had there been an increase or falling off in your deposits?"

Record, p. 77.

Nor would the Referee allow Mr. Charles D. Young, who was president of the National City

Bank of Brooklyn, to answer the following question:

"Q Has your bank suffered any in its deposits by reason of the competition of the trust companies, Mr. Young?"

Record, p. 75.

After thus excluding evidence tending to show that the National Banks of Brooklyn were suffering from the competition of the trust companies of Brooklyn, the learned Referee decided that there was no such competition, because this Court had so decided under a different statute, and without any evidence before it, ten years before. It is submitted that the relators had the right to give any evidence of circumstances tending to show that the two classes of moneyed institutions were in such competition. That the error is vital will sufficiently appear from other considerations already submitted.

IX. The Fact that Banks and Trust Companies are Competitors in Business, and yet are Taxed with Gross Inequality, is a Matter of Common Notoriety and has been Frequently Commented upon by the Commissioners of Taxes and Assessments of the City of New York in their Published Reports Made from Time to Time to the Mayor of the City under the Requirements of Section 1544 of the Greater New York charter.—These official comments were not read in evidence before the Referee on the trial on this case; they are not therefore referred to here as strictly evi-

dentiary documents. The attention of the Court is merely called to them by way of argument, and we ask leave to submit them, very much as we might read or quote a paragraph from the official report of an adjudicated case, or the opinion of an Attorney General, or other public officer. They are as follows:

From the Report of the Commissioners of Taxes and Assessments of the City of New York for the year 1898 (page 22):

"While the banks are assessed to the individual "shareholders on the actual value of their share "stock, the trust companies, who are their com- "petitors in business, are assessed as a corporation "and are permitted to invest their assets in non- "taxable securities, and also allowed the deduction "of their debts, and otherwise permitted by law to "avoid just taxation. These conditions should be "corrected."

From the Report of the same Tax Commissioners for the year 1899 (page 30):

"As part of this report we again refer to one of the inequalities of the law enumerated in our previous reports," viz.:

"While the banks are assessed through the in- "dividual shareholders on the actual value of their "share stock, the trust companies, who are their "competitors in business, are assessed as a cor- "poration, and are permitted to invest their assets "in non-taxable securities, and also allowed the "deduction of their debts, and otherwise permitted "by law to avoid just taxation. These conditions "should be corrected. Perhaps the conditions "above referred to may account for the wonder- "ful increase of trust companies in this city dur- "ing the past year; and although their capital "has been increased, $14,850,000, yet this depart- "ment cannot expect to show any appreciable in- "crease in their valuation because of the aforesaid

"conditions. We reiterate that such conditions "should be corrected, and recommend that the "laws of assessment applicable to banks be ap- "plied to trust companies."

From the Report of the same Tax Commissioners for the Year 1900 (page 39):

"Subjoined is a comparative statement of "the assessment of banks and trust companies "in Manhattan and Brooklyn, the relative "inequality of which is clearly evidenced, as "these interests, being financially analogous, "should be similarly assessed. We have here- "tofore in our reports made special note of this "inequality; therefore without further com- "ment, we now submit the following summary, "the basis of which is the report of State "Superintendent of Banks, dated December 27, "1899, and the Report of the Comptroller of "the Currency, dated September 7, 1899:

	Banks.	Trust Companies	Totals	Percentage of each class	
				Bks.	Tr. C
"Captial Stock,	$ 83,124,700	$44,900,000	$128,024,700	65%	35%
"Capital Stock and surplus. "Dec. 31, 1899,	168,410,808	126,670,594	295,081,402	57	43
"Market value of capital, 1899, "based upon selling values of "stock in the open market,	253,083,500	225,137,500	478,221,000	53	47
"Aggregate value of resources, "1899,	1,277,450,061	628,606,870	1,906,056,931	67	33
"Total profits for the year 1899	*10,526,637*	*31,517,897*	*42,044,534*	*25*	*75*
"Dividends paid from above "in 1899,	*6,180,016*	*5,507,500*	*11,687,516*	*53*	*47*
"Total sum in taxes paid on "personal property, 1899,	*1,865,160*	*159,030*	*2,024,249*	*92*	*8*

From the Report of the same Tax Commissioners for the Year 1901 (page 33):

> "For years this Department has been "directing attention to the inequality which "existed between the banks and trust com- "panies, and claimed that the relative ine- "quality, which was clearly evident, should no "longer be allowed to exist, as these interests, "being financially analogous, should be simi- "larly assessed. The Legislature has under- "taken to bring that result about in such a "manner as may lead to a worse condition than "existed before, if certain rights claimed by "the shareholders of the bank stock are al- "lowed by law."

We respectfully submit, that if what is here stated as a glaring fault of the tax system by the taxing officers of the great City of New York be true, the Court must find in favor of the relators (plaintiff in error here).

This constant complaint of the tax commissioners has at last resulted in the enactment of a uniform law taxing banks and trust companies at the same rate; the tax on the banks being in form against their share stock to attempt to comply with the United States statute.

> Chapter 535, Laws 1901 of New York.
> Chapter 550, Laws 1901 of New York.

It is worthy of note that in enacting a general banking law the Legislature of New York saw fit to include the trust companies therein.

> "The Banking Law" of New York State, Ch. 689, §§ 150–163.

Relief Prayed for in this Court.

It is therefore submitted that the judgment of the Supreme Court of New York, entered in pursuance of the mandate of the Court of Appeals of that State, should be reversed.

By the Tax Law of New York (Chapter 908 of the Laws of 1896, Sec. 253), it is provided that "if it shall appear upon the return to a writ of "certiorari, that the assessment complained of is "illegal or erroneous or unequal for any of the "reasons alleged in the petition, the Court may "order such assessment, if illegal, to be stricken from "the roll, or if erroneous or unequal, it may order "a re-assessment of the property of the petitioner, "or the correction of his assessment upon the roll, "in whole or in part, in such manner as shall be in "accordance with law, or as shall make it conform "to the valuations and assessments of other prop-"erty upon the same roll, and secure equality of "assessment."

This Court has, of course, the same power in directing the judgment which should be entered. This assessment is "illegal," within the meaning of the above statute, as distinguished from an erroneous assessment; and therefore the order of this Court should be that the assessment be stricken from the tax roll of the City of Brooklyn (now a part of the City of New York), for the year 1897.

The plaintiffs in error therefore pray this Court to direct the Supreme Court of New York for Kings County, to enter a final order or judgment striking from the tax roll the assessment for taxes laid against these relators (plaintiffs in error), as shareholders of the First National Bank of Brooklyn, for the taxing year 1897, as being wholly illegal and void by reason of the fact that such tax assessed was at a

greater rate that was assessed upon other moneyed capital in the hands of individual citizens in the State of New York, within the same taxing district. But if this Court should be in doubt upon the question whether the First National Bank of Brooklyn, whereof these relators (plaintiffs in error) are shareholders, did in fact suffer from unfriendly competition on the part of the eight trust companies within the same taxing district, then the plaintiffs in error pray that this cause may be remanded, with directions to the Court below to grant a new trial to the plaintiffs in error.

Respectfully submitted,

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Of Counsel.